

Russia's Standoff with Europe: Contemporary Dilemmas of International and Constitutional Law

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Nearly three decades have passed since the collapse of the Soviet Union in 1991. At the time, the scholarly community was keen on joining Fukuyama in his belief in the “end of history” that was supposed to propel Russia away from the ideological “otherness” of the Soviet legal thought towards European liberal democratic values. The new spirit of optimism of 1991 had created a deceptive euphoria: Russia’s dark legacies of Communism and authoritarian rule were seen merely as a bump on the road. Yet, the dream of united Europe from Lisbon to Vladivostok had failed to materialize.



This spring, the *Review of Central and East European Law (RCEEL)* mobilized some of the members of its Editorial Board to debate in Graz the hot topic of Russia’s complex and rocky relationship with Europeanization and the European Court of Human Rights (ECtHR). The no less controversial Russian interpretation of international law, in particular the principle of self-determination, was also brought to the spotlight, just like the Russian legal perspectives on the principle of sovereignty. In the following, the author will seek to convey the key ideas contemplated in this discussion.

The Russian Federation (RF) may have retained only a fraction of the bargaining power possessed by the USSR in its heyday. It is equally commonplace that the eye level of constellation between the Soviet Union and the US remains a thing of the past. To illustrate, the most recent hike of the Pentagon’s budget equals the *entire* military budget of the Russian Federation. Nevertheless, Russia’s annexation of Crimea or its incursion into Eastern Ukraine illustrate that its foreign policy goals remain as ambitious as they are contentious – often fueled by its efforts to shoehorn its interests into the rationales of international or constitutional law, in particular, the principle of self-determination. Not even the US and EU economic sanctions have left a measurable dent in these policies.

Similarly, Russia’s commitment to respect the European Convention on Human Rights is on shaky ground, as emphasized by Professor Bowring (London U). The reaction of the Russian Constitutional Court (RCC) to the ECtHR judgment in *Anchugov and Gladkov v. Russia* of 2013 leaves little room for doubt: the ECtHR judgments that are deemed incompatible with the Russian Constitution will be treated as “impossible to implement”. A 2015 amendment to the law of the RCC formalized this new competence of the RCC, effectively permitting it to rob of its effectiveness any ECtHR judgment against Russia, insofar as it contravenes RF Constitution.

The reaction of the Russian Constitutional Court to ECtHR judgment of 13 April 2017 in the

notorious case of Beslan siege in North Caucasus that cost 330 lives, Tagayeva v. Russia, remains to be seen. In this judgment the European Court of Human Rights ruled that Russia violated the right to life guaranteed under Article 2 ECHR with regard to over four hundred victims of the Beslan school siege in Russia's Northern Caucasus region. On 1 September 2004, armed Chechen separatists attacked a school in Beslan, North Ossetia, and took hostage over 800 children and several hundred adults. Three days later, the Russian counter-terrorist forces stormed the school using battlefield weaponry, such as flame throwers, heavy machine guns and tanks. Over three hundred people – most of them children – died during the siege.

In its 2017 judgment, the ECtHR held that that Russia's response was inadequate. The Court emphasized the positive obligation of the contracting parties to the Convention under Article 2 ECHR to prevent any threats to life and to guarantee effective investigation. By five votes to two (Russian and Azerbaijani judges issued partly dissenting opinions), the Court held that the use of heavy lethal weapons during the counterterrorist operation in Beslan was disproportionate in a hostage situation, as it was excessive and indiscriminate. Hence, the ECtHR found Russia in violation of the positive obligations arising from the right to life under the Convention.

Whether Russia will protest or heed to the ECtHR remains to be seen. Yet its angry response to the Tagayeva judgment, viewing it as “unacceptable” sends an unequivocal signal: its commitments under the Convention appear to be merely contingent. The clash between Russia and the ECtHR tainting its cooperation with the Council of Europe suggests that any closer cooperation with the EU is out of question as well. Europe's attempts to push Russia towards Westernization and Europeanization have resulted in a backlash.

Russia's exceptionalist self-image and “tu quoque” defense

This backlash may be tied to Russia's exceptionalist self-image in the context of international law, according to Professor Lauri Mälksoo's (Tartu U). In particular, he emphasized that Russia's reluctance to assume the liberal values prevailing in the Western hemisphere stem from the notion of exceptionalism that paints a wide civilizational gap, inherent distinctness between Russia and the West. Therefore, the West might be short-sighted and mistaken in employing a rather condescending strategy to compel Russia to join the ranks of liberal democracies: the recurring notion that Russia only needs to learn about the human rights or the rule of law in order to start identifying with these values is counterproductive. It merely confirms Moscow's suspicions that the West does not treat it as its equal.

Mälksoo also reflected on Russia's “tu quoque” defense (Latin for “you too”). States raise this defense arguing that, although they may have committed a particular unlawful act of which they are accused, but so has the accusing side. Indeed, in response to accusations that Crimean annexation violated international law, Russian President Vladimir Putin pointed to the US' actions in Iraq and Libya, suggesting their lack of compliance with international law. He maintained that the occupation of Iraq was illegal, whereas in Libya, Putin argued, the Americans had overstepped the boundaries of the authorization by the Security Council.

In its essence, this rather simplistic defense appears to call for fairness. Yet it has no basis in international law. Moreover, there is no doubt about the illegal character of the Crimean annexation. Nevertheless, as Mälksoo argued, despite the demagogic character of the “tu quoque” argument, it is difficult to wholly dismiss it. After all, the international community has also broadly criticized the invasion in Iraq. Thus, unless the West addresses its own issues of compliance with international law, its attempts to compel Russia to respect these norms are likely to miss their target.

The European Neighborhood Policy

Similarly, unless the EU faces its home-grown problems, the “export” of EU values to the Eastern European countries *via* the conditionality of the European Neighborhood Policy appears to be bound to fail, as Professor Dimitry Kochenov (Groningen U) proposed. For one thing, the EU’s eastern neighbors do not appear to share these EU values. What is more, the EU has no mechanism to ensure that these very values are respected *within the EU itself*, as the cases of Hungary or Poland illustrate. Notably, the EU’s struggle – at home and in its neighborhood – to ensure respect for its values established in Article 2 TEU can be traced back to the very origins of the European integration that reflect strictly economic rather than value-based considerations.

Mirroring Kochenov’s concerns that the European Neighborhood Policy may be inherently flawed to become a success story, Professor Peter Van Elsuwege (Ghent U) proposed that the EU’s efforts to forge even closer links via association agreements (AA) with its eastern neighbors face massive challenges, given Russia’s major influence in the region. Association agreements are incompatible with Russia-led Eurasian Customs Union. A country joining this Customs Union loses its exclusive competence to determine its trading policy. Thus, it can no longer establish the Deep and Comprehensive Free Trade Area (DCFTA), which forms part of the AA with the EU.

Moreover, the AAs are not only a thorn in the side of Russia-EU relationship. The sheer ambition defining the AAs is astounding as well: through legal approximation, the EU’s eastern neighbors – Ukraine, Moldova, and Georgia – must incorporate into their legal orders not only the existing *acquis communautaire* – consisting of over 40,000 legislative acts – but also future EU legislation. In other words, the AA obliges them to incorporate thousands of European legislative acts, although they have absolutely no say in drafting this legislation.

Russian understanding of the state

In addition to specific disagreements about the Westernization of Eastern Europe, there may be inherent, deep-rooted differences of Russia and the West with regard to some of the pillars of constitutional law or democracy. Professor Mikhail Antonov (Higher School of Economics in St. Petersburg) argued that the Russian understanding of what is a *state* or state sovereignty has a deeply *personal* or *personalized* undertone. This is reflected even in the Russian language. In many European countries, the term *state* originates from a non-personalized Latin *status*, meaning something fixed or set (see the German *Staat*, English *state*, or French *état*, to name just a few). Yet in Russian, the state –*gosudarstvo* – is

linked to a ruler – *gosudar*. In this respect, moderator Benedikt Harzl (Graz U) recalled that another Russian term for the state – *derzhavo* – semantically ties the state to (private) ownership.

This legal-turned-semantic debate suggests that the persisting conflict between Russia and its Western counterparts may hardly be reduced to a simple clash of geopolitical interests. On the contrary, the fundamentally different perceptions of key legal terms that appear to prevail in Russia may also offer valuable clues for understanding and addressing Russia's historical aversion to the liberal democratic values rooted in the Western approaches to the state.

*On April 28th, renowned experts of Central and East European (CEE) law gathered at the Centre Russian East European Eurasian Studies (REEES) of the Faculty of Law of the University of Graz. They debated the legal dilemmas facing the contemporary relationship of Russia vis-à-vis the EU and the international community. The discussion entitled **“Ideological Backlash in Russia: The Roll-back of 1991? Legal and Political Implications”** accompanied the first annual meeting of the Editorial Board of Graz-based Review of Central and East European Law (RCEEL) led by the General Editor Professor Joseph Marko. The Review targets legal conundrums of CEE and the Commonwealth of Independent States (CIS) for over forty years now. Its sister publication at Brill Nijhoff, the book series Law in Eastern Europe, represents an even older tradition, celebrating its 60th anniversary this year. After the collapse of the Soviet Union, the Review remained a forum for legal debates on the CEE region, including, among other things, post-Soviet Russia's relationship vis-à-vis Europe or the legal approximation that took central stage in the members of the post-Soviet bloc seeking European integration. For more information on Review of Central and East European Law, see: <http://www.brill.com/review-central-and-east-european-law>.*